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In the Supreme Court

OF THE

United States

OCTOBER TERM 1981

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether, in a comprehensive water rights adjudication, adversity of claims must appear on the face of the pleadings before the doctrine of res judicata/collateral estoppel can be asserted as a bar to relitigation of the same claims in subsequent actions.

II

Whether the Secretary of the Interior is authorized to negotiate and settle property disputes between Indians and non-Indians, or whether, instead, he must litigate them to final judgment.

PARTIES TO THE ACTION

This action involves more than seventeen thousand individual parties, including several thousand landowners who are represented by petitioner Truckee-Carson Irrigation District. These parties have been listed in a filing submitted to this Court by the State of Nevada, which filing accompanies its petition for certiorari in this case. Because preparation of a separate such list to accompany this petition would be burdensome, repetitious and impracticable, petitioner Truckee-Carson Irrigation District hereby adopts and incorporates herein the list of parties submitted by the State of Nevada.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 649 F.2d 1286. Subsequent to its publication, the decision was amended by order of the Court entered January 5, 1982. Both the decision and the order are reproduced in the Appendix (App., pp. 1, 66).

The decision of the District Court is embodied in its Memorandum Decision and its Findings of Fact and Conclusions of Law entered December 12, 1977. The District Court's decision was not published; it is reproduced in the Appendix (App., pp. 72, 94).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on June 15, 1981, and amended by its order of January 5, 1982. Petitions for rehearing were filed by defendant Truckee-Carson Irrigation District, petitioner herein; by plaintiff-intervenor Pyramid Lake Paiute Tribe of Indians; and by defendant-intervenor State of Nevada. All petitions for rehearing were denied by order of the Court of Appeals filed March 11, 1982. A petition for certiorari is therefore due June 9, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Rule 17.1 of this Court.

STATUTORY PROVISIONS INVOLVED

One of the issues raised by this case concerns the extent the Secretary of the Interior's authority to manage federal property held in trust for the Indians. The following statutes are involved in that issue:

25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may

prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9:

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

STATEMENT OF THE CASE

This case involves rights to the waters of the Truckee River, a major stream which originates in the Sierra Nevada mountains of California and Nevada. The Truckee flows out of Lake Tahoe through California for a distance, then through the arid Western Nevada desert past the cities of Reno and Sparks, finally terminating in a large saline desert lake known as Pyramid Lake, which has no outlet. Pyramid Lake is located in the Pyramid Lake Indian Reservation, a reservation which was established by executive order for the benefit of the Pyramid Lake Paiute Tribe of Indians (hereinafter referred to as 'the Tribe"). The waters of the Truckee River are used upstream from the reservation by the Sierra Pacific Power Company to generate electric energy, by the residents of Reno and Sparks for domestic and municipal purposes, by hundreds of irrigators on the Truckee River, and by several thousand farmers and their families on the 73,000 acre Newlands Project, a federal reclamation project, for irrigation, stock watering, and domestic purposes.

This litigation was commenced by the United States, on behalf of the Tribe, to assert a *Winters* doctrine reserved water right[1] to Truckee River flows sufficient to sustain

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[1]In *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908) this Court held that in establishing the Fort Belknap Indian Reservation, the federal government had impliedly reserved sufficient

a naturally spawning fishery in Pyramid Lake and the lower reaches of the river. For this right, the United States asserts a priority date of 1859, the earliest priority on the entire river. To establish this asserted right, the United States joined as defendants all of the other known diverters of Truckee River flows in Nevada, the State of Nevada, the Sierra Pacific Power Company, the Washoe County Water Conservation District, the Cities of Reno and Sparks, some 17,000 individuals, and the Truckee-Carson Irrigation District, petitioner herein (sometimes hereinafter referred to as "TCID" or "the District"). Because the District Court found that TCID could adequately represent the interests of the thousands of farmers on the Newlands Project, the United States was not required to name and serve them individually.

The defendants asserted that the United States was barred by res judicata/collateral estoppel from asserting this claim for additional water from the Truckee because of the final judgment entered in an earlier comprehensive adjudication of water rights in the Truckee River, *United States v. Orr Water Ditch Co.*, Equity No. A-3, in the United States District Court for the District of Nevada (hereinafter referred to as *"Orr Ditch"*).

The United States contended that because it had asserted the rights of both the Pyramid Lake Indian Reservation and the Newlands Reclamation Project in the *Orr Ditch* case, its representation of the Tribe had been inadequate, with the result that the United States was neither bound by the *Orr Ditch* Final Decree nor prohibited from asserting additional reserved water rights in this later separate action.

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rights to water from the river running through the reservation to accomplish the purposes of the reservation. Thus, water rights appurtenant to federal reservations are referred to as *"Winters* doctrine rights" or "reserved water rights."

The trial of this action was bifurcated. The first phase addressed the issue of whether the final judgment in *Orr Ditch* operated to raise the bar of res judicata/collateral estoppel against the United States' attempt to seek additional water for the Pyramid Lake Indian Reservation in this litigation. If the United States were not so barred, the second phase of the trial in this action would determine whether, and in what amount, a reserved water right for fishery purposes may be implied, under the *Winters* doctrine, for the Pyramid Lake Indian Reservation.

The District Court, after forty-one days of trial on the issue of preclusion, entered judgment against the plaintiffs and dismissed their complaint. It analyzed the historical facts concerning *Orr Ditch*, and found that the *Orr Ditch* Final Decree did bar the United States from asserting any new claims to Truckee River water.

The District Court made the following findings concerning the *Orr Ditch* litigation:

(a) The United States commenced the *Orr Ditch* litigation in order to obtain a final and comprehensive adjudication of all the water rights and claims on the Truckee River and its tributaries. In that litigation, the United States pursued two separate claims for water rights on the river: one for the Pyramid Lake Indian Reservation, with an 1859 priority (the most senior water right on the river); and one for the Newlands Project upstream, with a 1902 priority (the most junior water right on the river at that time) (App., pp. 99, 100).

(b) After a trial, the Special Master assigned to the *Orr Ditch* case proposed findings. Hearings on the proposed findings were held and a Temporary Restraining Order was entered, in 1926, to test the proposed decree before entry of final judgment (App. p. 101).

(c) Nine years later in 1935, a negotiated settlement, known as the Truckee River Agreement, was executed by the major water users on the stream. The parties to this agreement were the United States, Washoe County Water Conservation District, Sierra Pacific Power Company, the Truckee-Carson Irrigation District, and others.[2] The Truckee River Agreement proposed a physical solution to the problem of water distribution on the river. It provided that a final decree in the litigation based on its negotiated terms would be entered only after construction of an upstream storage facility, Boca Reservoir (App., pp. 102, 110).

(d) Congressional authorization of the reservoir was obtained and the Boca Reservoir was built. Thereafter, upon motion of all the signatories to the Truckee River Agreement, including the United States and TCID, the District Court held three days of hearings, and entered a final decree on September 8, 1944. The final decree incorporated the agreed-upon settlement of the water rights, including the water rights of the Pyramid Lake Reservation which were greater than those proposed by the Special Master. Under the decree the reservation's rights were increased in both acreage and water duty. However, the reservation's decreed right did not include flows specifically for the maintenance of a fishery. (App., pp. 102, 103, 110).

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[2]TCID was organized after the entry of the Temporary Restraining Order in 1926. Hence, at that time the United States represented the interests of the farmers within the Newlands Project. By the time settlement negotiations began, TCID had taken over operation of the Newlands Project, and represented the landowners' and water users' interests throughout those negotiations and in all subsequent court proceedings. Therefore, when the settlement was negotiated, the United States in fact represented only one interest, that of the Tribe.

(e) Finally, the *Orr Ditch* Final Decree permanently enjoined the parties to the litigation, and their successors, from ever asserting any right to additional waters from the Truckee River (App. pp. 185, 247). It was this decree that the District Court found created a res judicata bar and prohibited the assertion of any new reserved water rights after the water users in the region had relied on the finality of the previously adjudicated rights for nearly forty years.

In finding the above facts sufficient to warrant invocation of res judicata, the District Court addressed the issue of the federal government's inescapable duty to represent multiple and often inconsistent federal interests in litigation, and the authority of the executive branch to reconcile and choose between such interests. Congress was aware, the District Court held, of the inevitable clash between Indian interests and the interest of the government in opening and settling the West, and Congress has consciously given reclamation a higher priority. Thus, the District Court concluded, the Secretary of the Interior had been authorized to manage the *Orr Ditch* litigation as he had, with the result that any unasserted claims on behalf of the Pyramid Lake Reservation had been extinguished by the *Orr Ditch* Final Decree.

On appeal, the Ninth Circuit Court of Appeals upheld the District Court's dismissal as to every defendant *except TCID*. It expressly held that even subsequent appropriators who had not been parties to *Orr Ditch* but had reasonably relied on the finality of the *Orr Ditch* decree were entitled to rely on it, and could assert the bar of res judicata/collateral estoppel against the United States in this action.

As to TCID, however, the court held that because its interests, and, inferentially, the interests of the landown-

ers and water users within TCID's boundaries, had been represented by the United States in the prior action, TCID could not raise the defense of res judicata/collateral estoppel. The reasoning which the court offered for this conclusion was that a prior judgment does not preclude later litigation of the same matter between parties to the prior suit, if they were not "adversaries under the pleadings." Because the "requirement that adversity be explicitly established on the record, by pleadings" (App., p. 55) was not satisfied in the *Orr Ditch* case, the court said, the United States is free to relitigate the existence and amount of its water right for the Pyramid Lake Indian Reservation, *but only against TCID*, and only to the extent of the water rights decreed to the United States for the Newlands Project in the *Orr Ditch* Final Decree.

The Ninth Circuit also indicated, by way of footnote, that the Secretary of the Interior (hereinafter referred to as "the Secretary") has no authority under 25 U.S.C. § 2 or 25 U.S.C. § 9 to negotiate and compromise disputed property claims between Indians and non-Indians (see App., p. 29, n. 10). Therefore, even though the United States did not represent the Newlands Project farmers in the negotiation of the Truckee River Agreement, the Ninth Circuit held that the agreement was not a bar to the new litigation.

A. The special importance of this case

The Ninth Circuit's decision has significant potential for unsettling long-established rights throughout the arid West. As this Court has observed, Indian water rights in the Southwest are ubiquitous (*Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 811, 96 S.Ct. 1236, 1243 (1976)), and water, essential to life and livelihood, is perhaps the most critically scarce resource of the region (*Id.* at pp. 804, 1239). Furthermore, approximately half of all lands

in the Western United States are held by the United States (*United States v. New Mexico*, 438 U.S. 696, 699, n. 3, 98 S.Ct. 3012, 3013, n. 3). When disputes arise, therefore, particularly disputes over water rights, it is virtually impossible to avoid federal involvement and federal representation of multiple interests. Since independent representation of Indian tribes is a phenomenon of fairly recent vintage, it is a near certainty that many or most long-standing decrees and agreements involving Indian lands and other federal property were the result of unitary federal representation.

Because of these facts, the Ninth Circuit's ruling creates the very real possibility that numerous property rights which are federally derived will be subject to disruption solely on the bases that (a) at some point in the past, the government may have tried to avoid unnecessary litigation concerning Indian title, or, unavoidably, may have litigated multiple federal claims simultaneously; and (b) at some point in the future, a government official may decide that he disagrees with the claims made, strategy employed, or legal position taken by his predecessors.

The Ninth Circuit's decision merits consideration by this Court because it thwarts the clear congressional policy of encouraging comprehensive adjudication of water rights, including federal water rights; it encourages unnecessary litigation and relitigation of disputed claims; and it threatens wholesale disruption of long-standing property rights throughout the Western United States. The decision merits reversal because it does not comport with the facts of the case, it utterly disregards soundly established principles of trust law, and it directly contravenes this Court's development of the doctrine of res judicata/collateral estoppel and conflicts with decisions of five other Circuit Courts of Appeals.

BASIS FOR JURISDICTION BELOW

The jurisdiction of the District Court was based on 28 U.S.C. § 1345.

ARGUMENT

I

THE DECISION OF THE NINTH CIRCUIT SUBVERTS THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL ESTABLISHED BY THIS COURT

In *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, (1979), decided two terms ago, this Court summarized the principles of res judicata and collateral estoppel:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies [citation]. . . ." Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. [Citations.] Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. [Citations.] Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. (440 U.S. at 153, 99 S.Ct. at 973.)

Montana v. United States, supra, is only the most recent of a decade-long line of cases commencing with *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434 (1971), which evidence this

Court's commitment to the broadest possible application of the res judicata/collateral estoppel bar. This Court has progressively rejected the rigid technical constraints which, prior to *Blonder-Tongue*, had historically limited the application of res judicata and collateral estoppel.

Thus, in *Blonder-Tongue Laboratories v. University of Illinois, supra,* the Court rejected the mechanical application of the test of "mutuality of estoppel" as a requirement for collateral estoppel. In *Sea-Land Services Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806 (1974) the Court applied the bar to non-parties who had been represented by a fiduciary in the prior action. In *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645 (1979) the Court held that even the "offensive" use of collateral estoppel was permissible. And most recently, in *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970 (1979), this Court again extended the doctrine, applying it to a plaintiff which had been neither a party nor represented by a party in the prior litigation but which, because of its off-the-record control of the litigation, had had a full opportunity to litigate its claim.

Only where prosecution of the prior action was confined by special, restrictive rules of evidence, procedure, and appeal not applicable to the subsequent action, has this Court refused to apply the res judicata/collateral estoppel bar (*See: Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999 (1980); *but see: Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 411 (1980)).

It is plain that in the present action the United States seeks to assert the same claim, a *Winters* doctrine claim for a reserved water right for the Pyramid Lake Reservation, that it asserted in the comprehensive Truckee River adjudication which it commenced in 1913 and took to final judgment in 1944. The District Court held, and we agree, that a *Winters* doctrine right for a federal reservation

constitutes a single cause of action (App., p. 104). Under *Montana* and its predecessors, then, the United States is barred by res judicata/collateral estoppel from relitigating the same claim in this case.[3]

The functional approach which this Court's recent decisions have utilized toward the issue of preclusion serves a very beneficial purpose:

> [P]reclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (*Montana v. United States*, 440 U.S. 147, 153-154, 99 S.Ct. 970, 973-974 (1979).)

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[3]Even if the *Orr Ditch* judgment afforded only issue preclusion under the doctrine of collateral estoppel, rather than claim preclusion, the United States would be barred because the issues in this case are identical to those actually litigated in *Orr Ditch*.

The issues necessarily determined in the *Orr Ditch* case were (1) the existence of a *Winters* doctrine right for the reservation, (2) the date of priority of the right, and (3) the amount of the right.

The issue raised in this litigation is precisely that litigated in the prior action: The amount of water to which the Pyramid Lake Reservation is entitled by virtue of the 1879 executive order setting aside the Pyramid Lake Reservation for the benefit of the Indians. The same facts are controlling, namely, the date the reservation was established and the purpose for which it was established. And the same "bundle of legal principles" is involved, to wit, that the establishment of a federal reservation implies the reservation of sufficient water rights to fulfill its purposes (*Commissioner v. Sunnen*, 333 U.S. 591, 601-602, 68 S.Ct. 715, 721 (1948); *Montana v. United States*, 440 U.S. 147, 156, 99 S.Ct. 970, 975-976 (1979); *T. J. Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979)).

This Court has also noted that these very considerations underlie the clear federal policy which encourages comprehensive adjudication of water rights in a single unified proceeding, such as the *Orr Ditch* case (*Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 819, 96 S.Ct. 1236, 1247 (1976)).

Recognizing the salutary purposes of the res judicata/collateral estoppel doctrine, the Ninth Circuit held that the defendants in *Orr Ditch* are entitled to rely on the finality of the judgment and may properly raise it as a preclusionary bar in this litigation. The court further held that, since the *Orr Ditch* litigation was, as the government had intended it to be, a "virtually comprehensive adjudication that approximated a statutory *in rem* proceeding, and avoided the defects associated with *in personam* water adjudications" (App., p. 49), it would be "manifestly unjust" *(id.)* to permit the *Orr Ditch* defendants to rely on the decree and not to permit subsequent appropriators to do the same.[4]

As to TCID alone, however, the Ninth Circuit held that because the adversity of the interests of the Newlands Project and the Pyramid Lake Reservation had not been "explicitly established, on the record, by pleadings" (App., p. 55) in the *Orr Ditch* case, the farmers on the Newlands Project who currently hold the rights decreed to the United States in *Orr Ditch* may not rely on the finality of that decree to protect their water rights (App., p. 55).

In so holding, the Ninth Circuit has taken a giant leap backwards from this Court's increasingly substantive application of the res judicata/collateral estoppel bar which limit litigants to one full and fair opportunity to litigate

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[4]In so holding, of necessity the Ninth Circuit impliedly found that the United States had been accorded a full, fair opportunity to litigate its claim, and thus that due process was afforded.

their claims. By imposing the hypertechnical limitation of "adversity on the pleadings" the Ninth Circuit has revitalized the archaic rule that form governs over substance. As a consequence, this Nation's already overburdened judicial system faces the prospect of still more unnecessary litigation and long-standing property rights which have been the basis of a major agricultural economy throughout Western Nevada and the seventeen Western states can no longer be relied upon.

The Ninth Circuit's requirement of "adversity on the pleadings" adds nothing to the due process safeguards already established by this Court. If a litigant has not had a full and fair opportunity to litigate his claim in an adversary context, the requirement of "adversity on the pleadings" will afford him no protection not already guaranteed by this Court's prior decisions. Conversely, if he *has* had such an opportunity, the "adversity on the pleadings" requirement will serve only to accord him an unwarranted second chance, and to inflict unnecessary expense on the defendants, burden on the judicial system, and uncertainty on long established property and financial interests.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF FIVE OTHER CIRCUIT COURTS OF APPEALS

In addition to undermining the doctrine of res judicata/collateral estoppel developed by this Court over the past decade, the Ninth Circuit's requirement of formal "adversity on the pleadings" is directly at variance with decisions of the Third, Fourth, Fifth, Seventh, and Eighth Circuits. Since at least 1940 decisions in these five circuits have held that parties who were not so adverse could be barred in later litigation between themselves.

In *National Bondholders Corp. v. Seaboard C. Nat. Bank*, 110 F.2d 138 (4th Cir. 1940) a mortgagor refinanced his loan and attempted to discharge his preexisting debt by delivering funds to a third party. When the third party failed to deliver the funds to the trustee of the deed, the lender of the refinancing loan sued the mortgagor for repayment of that loan and also sued the trustee and the guarantor of the original loan to clear title to the trust deeded property. In the initial litigation the third party was found to be the agent of the original trustee, rather than the agent of the mortgagor, and the first promissory note obligation was held to have been properly discharged.

In a subsequent lawsuit the guarantor of the first promissory note sued the trustee thereof to recover the value of that note. The trustee again attempted to claim that the third party had not been its agent. The Fourth Circuit Court of Appeals applied the doctrine of res judicata/collateral estoppel against the trustee, despite its contention that the doctrine was inapplicable due to the lack of adversity between it and the guarantor in the first suit. On this issue the court held:

> . . . where some finding of fact is made in the first suit which is an essential element in a claim or action subsequently brought by one [co-party] against the other. . . . the judgment . . . is conclusive . . . in subsequent litigation between them. (110 F.2d 138, 144.)

Thus, the finding in the first suit of an agency relationship between the third party and the trustee was binding on the trustee in the later litigation, even though the trustee and the guarantor had not been adversaries, either on the pleadings, on the record, or in fact.

The Fifth Circuit followed *National Bondholders* in *Livesay Industries, Inc. v. Livesay Window Co.*, 202 F.2d 378 (5th Cir. 1953). There, the parties had been co-plain-

tiffs in an action against a third party to declare the validity of their then jointly held patent and to enjoin its infringement. Because the patent's validity had been an essential element in the prior action and had ben upheld, the Fifth Circuit held that the defendant could not challenge its validity in a second suit brought by its co-plaintiff in the earlier action.

The Seventh Circuit followed the same rule in *Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969). Therein Diamond, a casualty sufferer, and Fireman's its fire insurer, sued Lumbermens, the underwriter of Diamond's general liability policy which covered risks other than fire. Lumbermens sought dismissal of Fireman's on the ground that, because of the lack of adversity between Fireman's and Diamond, Fireman's was not a proper party to the action since it would not be barred by the judgment in any later action between it and Diamond. In reversing the trial court's dismissal order, the Seventh Circuit held that:

> . . . It is likewise clear that the parties need not be arrayed as adversaries in the prior litigation and that formal issues need not be drawn between the parties to apply the doctrine [of collateral estoppel]. (416 F.2d at 710.)

The leading and most often cited case rejecting formal adversity on the pleadings as a requirement for res judicata/collateral estoppel is *Scooper-Dooper, Inc. v. Kraftco*, decided by the Court of Appeals for the Third Circuit in 1974 (494 F.2d 840 (3d Cir. 1974)). In an arbitration proceeding Kraftco had been ordered to cease and desist from violating a collective bargaining agreement wherein it had agreed not to market in the Metropolitan New York area products produced elsewhere. A federal district court later enforced the arbitration decision in a declaratory

judgment action brought by Kraftco and Scooper-Dooper challenging the collective bargaining agreement. The District Court upheld the agreement and ordered Kraftco to stop selling products produced in Philadelphia to Scooper-Dooper for resale in New York. Kraftco obeyed this order and was thereafter sued by Scooper-Dooper, which again challenged the validity of the collective bargaining agreement. In affirming the lower court's dismissal of the action on the basis of collateral estoppel, the court held that:

> . . . , [T]his Circuit's nullification of the mutuality requirement renders non-adversity irrelevant to the doctrine of collateral estoppel. In this Circuit, a total stranger to a prior litigation may, in a subsequent suit, estop a party from re-litigating a claim which he lost in the prior controversy, provided that the initial opportunity to present the claim was full and fair. We see no reason to treat a co-plaintiff more harshly than a total stranger. (494 F.2d 840, 845.)

Echoing the reasoning of the Third Circuit in *Scooper-Dooper*, the Eighth Circuit has also abandoned "the requirement of strict adversity", which it recognized as "the companion rule to 'mutuality'." (*Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979).)

The cases discussed above show the Circuit Courts' clear movement away from requirements of strict adversity in res judicata/collateral estoppel cases. Indeed, other than the Ninth Circuit's decision below, we have found no decision since this Court decided *Blonder-Tongue*, in which a circuit court has applied a test of "adversity on the pleadings" to prevent the application of res judicata/collateral estoppel. In this matter, the Ninth Circuit stands alone, and is so far from accepted principles of preclusion that this Court should exercise its jurisdiction to reaffirm its commitment to substance over form and to reiterate that

the sole test to be applied in these cases is whether the party to be barred had a full, fair opportunity to litigate its claim in the prior action.

III

THE DECISION OF THE NINTH CIRCUIT FRUSTRATES THE IMPORTANT FEDERAL POLICY OF PROMOTING CERTAINTY OF WATER RIGHTS

A. Western water right claims are comprised of two elements: priority date and amount of entitlement

In the arid Western United States, the right to water is generally acquired by applying it to a beneficial use. Because the supply of water is finite and frequently inadequate to meet all demands for its use, the doctrine of "prior appropriation" has developed, by which a priority is accorded each water user based upon the date his appropriation was initiated. He who is first in time is first in right to the use of the water. The amount of the water right is the amount the appropriator actually needs for his use, up to the maximum which was put to beneficial use within a reasonable time after the right was initiated. Subsequent, or "junior", appropriators can obtain rights only to water which is surplus to the needs of all prior appropriators. Thus, an upstream junior appropriator may not be entitled to divert water flowing past his diversion point if the flow is insufficient to satisfy the needs of all downstream appropriators with earlier priority dates.

Similarly, federal reserved rights are characterized by a priority and an amount of entitlement. They are different only in that (1) the priority is based on the date the federal reservation is established, rather than on the date water use is first initiated, and (2) the amount of the right is the amount reasonably necessary to fulfill the purposes for which the reservation was established, rather than the amount historically used.

Because of the inherently interdependent nature of water rights and the need for certainty of water supply in planning and pursuing virtually every human endeavor, comprehensive streamwide water right adjudications are a necessity. Indeed, as this Court has observed, Congress enacted the McCarran Amendment (66 Stat. 560, 43 U.S.C. § 666) in order to promote such adjudications in place of piecemeal and repetitive water right litigations attended by the potential for inconsistent decrees (*Colorado River Water Conserv. District v. United States*, 424 U.S. 800, 811, 96 S.Ct. 1236, 1247 (1976)).

B. The United States must assert multiple claims in comprehensive water right adjudications

The federal government itself needs reliability and certainty in its water rights as much as private citizens do. It must be able to evaluate the adequacy of those rights for its various purposes and to make long-range plans for the exercise of its governmental functions with certainty. To do this it must know with assurance what water rights it can rely upon and whether those rights will provide an adequate water supply for the purpose contemplated.[5] To obtain the necessary certainty, the government must adjudicate its water right claims in comprehensive water rights litigation.

Such litigation necessarily implies the simultaneous representation of multiple federal claims. As this Court has noted, water is perhaps the most critically scarce resource in the West and Southwest, and Indian water

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[5]For example, the availability of water rights was a critical consideration in the recent investigations of the feasibility of the MX missile program in Nevada (*Newsweek*, June 8, 1981, p. 40; "MX Missile Decision", *Cong. Quarterly*, June 5, 1981, p. 411). And the adequacy and availability of water rights is a prime factor in evaluating the feasibility of developing this Nation's coal and oil shale reserves.

rights are "ubiquitous" (*Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 804, 811, 96 S.Ct. 1236, 1247 (1976)). In addition to lands held in trust for Indian tribes, moreover, the federal government owns approximately half of all the lands in the western states (*United States v. New Mexico*, 438 U.S. 696, 699, n. 3, 98 S.Ct. 3012, 3013, n. 3). It holds these lands for purposes ranging from wildlife preservation to national defense, all of which require water for their fulfillment. The extent to which multiple water right claims must be simultaneously asserted by the federal government cannot be precisely determined, but even a cursory examination of recent cases illustrates that comprehensive water right adjudication is impossible to achieve without representation by the United States of multiple claims which must, by definition, conflict.[6]

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[6]In *Colorado River Water Conserv. District v. United States*, the United States initiated suit against some one thousand water users to assert reserved rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law. The Court in *Colorado River* noted that the United States was also simultaneously pursuing multiple claims in adjudications in three other Colorado watersheds. (424 U.S. 800, 805, 806, 96 S.Ct. 1236, 1240 (1976)).

In *United States v. District Court, County of Eagle, Colorado*, water rights were asserted by the United States on behalf of the United States Forest Service, the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife. Potential future water needs of the Department of the Navy for development of its oil shale reserves were also noted by the Court (401 U.S. 520, 528, 529, 91 S.Ct. 998, 1004 (1971)).

In *Arizona v. California*, the United States asserted water claims on behalf of five Indian reservations in three states, National Forests, National Recreation and Wildlife areas "and other governmental lands and works" (373 U.S. 546, 595, 83 S.Ct. 1468, 1495 (1963)).

In *United States v. Alpine Land and Reservoir Co.*, 503 F.Supp. 877 (D. Nev. 1980), now pending before the Ninth Circuit Court

C. Requiring strict "pleading adversity" of claims would threaten privately held water rights on the Truckee River and throughout the West

Were only internal federal interests and priorities implicated in the decision below, this case might not cry out so compellingly for review by this Court. But federal action inevitably elicits private sector reliance.

A clear example of the interrelationship between governmental action and private sector reliance is the *Orr Ditch* case itself. It was precisely the need to ascertain water availability for the Newlands Project which impelled the government to seek adjudication of all prior water claims on the Truckee, including its own. (App., pp. 6, 100.) The Ninth Circuit's decision below, by postulating a fictitious non-adversity of water claims, has utterly destroyed the

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of Appeals, the United States purports to represent the water rights for the Toyiabe National Forest, Stillwater Wildlife Refuge, and the Newlands Project, but has advanced arguments based primarily on the interests of the Pyramid Lake Indian Reservation located in a different but related watershed.

Even in the case at bench, the United States is simultaneously pursuing claims on behalf of the Pyramid Lake Indian Reservation, the Stillwater Wildlife Refuge, the Toyiabe National Forest, and other federal purposes. (App., p. 16, 17.)

Whether the Ninth Circuit's decision would require separate and independent representation of each adversely pleaded federal claim is unclear. If not, nothing of substance would be accomplished by merely listing the claims separately and adversely on the pleadings. If so, an army of federal lawyers would be required for each water adjudication. Even then, however, it is highly questionable whether any additional quantum of "adversity" would be achieved. Each water right claim of the federal government is unique and has a unique identity composed of two elements: priority and amount. In any comprehensive water adjudication both elements are necessarily litigated in an adversary context by every other water right claimant with a later priority, since every prior right diminishes the water supply available to such claimants.

very certainty which it was the government's primary purpose in *Orr Ditch* to achieve. And, by stripping the Newlands Project of its water rights, the decision below jeopardizes the lives and investments of thousands of farm families who built an agrarian society at the invitation of the federal Reclamation Act and in reliance on the certainty of judicially established federal water rights.

By permitting reduction of the Newlands Project rights at this late date, the Ninth Circuit, in its decision below, sanctions invasion not only of rights still held by the United States, but also of rights now held by transferees of federal lands and water rights. Water rights on a reclamation project are appurtenant to the land (43 U.S.C. 372) and are owned by the individual project farmers (*Ickes v. Fox*, 300 U.S. 82, 95, 57 S.Ct. 412, 416-417 (1937)). It is these farmers' rights which the Ninth Circuit has held may now be retrieved by the United States, despite the fact that the District Court found that the farmers were unaware of any impropriety in the government's representation of the reservation. (App., pp. 103, 107).

The Newlands Project farmers paid valuable consideration for their water rights, by purchasing and improving the land, repaying the construction costs of the project, and detrimentally relying on the certainty of those rights for two generations. Retrieval of such rights at this point violates clearly established trust law principles which protect a purchaser's innocent reliance on a fiduciary's good faith dealings with his trust beneficiaries (See 4 *Scott on Trusts*, §§ 283-285, pp. 47-51 (1967)). A purchaser's innocent reliance is protected for the same policy reasons which underlie protection of a litigant's innocent reliance on a fiduciary's proper representation of his beneficiaries. No rational purpose is served by the Ninth Circuit's distinction between innocent purchasers and innocent litigants.

As this Court observed, the interlocking and interdependent nature of adjudicated water rights makes it inevitable that "'any order or action affecting one right affects all such rights.'" (*Colorado River Water Conserv. District v. United States*, 424 U.S. 800, 811, 96 S.Ct. 1236, 1243 (1976) quoting S. Rept. No. 755, 82d Cong. 1st Sess., pp. 4-5 (1951)). The Ninth Circuit transparently attempted to craft its decision in such a way that only the decreed rights of the Newlands Project could be invaded. But because of the interlocking nature of the rights involved, the court's attempt to insulate other water users from the impact of its decision is bound to fail.

The water rights decreed to the federal government in *Orr Ditch* are much greater than heretofore exercised by the Tribe and TCID, and junior appropriators are utilizing the excess until TCID and Indian demands build up to their maximum levels. Therefore, any future determination that the reservation is entitled to greater flows for its fishery will result in an expanded exercise of the government's *Orr Ditch* rights. Because the Truckee River is already fully appropriated during most of the year, correspondingly less water will be available for the junior appropriators. Thus the subsequent appropriators, whom the Ninth Circuit tried so pointedly to shelter from the impact of its decision, will inevitably be deprived of water nevertheless, as the *Orr Ditch* comprehensive decree is unraveled.

D. Factual adversity between claims is inherent in a comprehensive water right adjudication

This disruption of Western Nevada's water-based economy is unnecessary, and unsupported by either law or fact. A strict requirement of "adversity on the pleadings" has never reflected the realities of comprehensive stream-wide water right adjudications. In such actions, alignment

as plaintiff or defendant is irrelevant. Because the flow of water is finite, every claim is adverse to every other claim. As the Idaho Supreme Court explained, when addressing the issue of the adversity requirement:

> [I]t matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute. (*Morgan v. Udy*, 79 P.2d 295, 299 (Idaho 1938).)

If all claims in actions such as *Orr Ditch* are indeed adverse regardless of the parties' arrangement on the pleadings, one would expect to find in the record of *Orr Ditch* that both the priority and the amount of the water right claim asserted on behalf of the Pyramid Lake Reservation were in fact separately litigated in an adversary context between the government and non-governmental junior appropriators. In fact, the record shows this to have been the case. Throughout the litigation, and up to the entry of the final decree, the private defendants in *Orr Ditch* vigorously opposed both the priority date and the amount of water claimed by the government for the Pyramid Lake Reservation. (See Exhibits B-480, B-481, B-482, B-483, B-484, B-485, B-486, B-488, B-489, B-490, B-491, B-515.)

Thus, in *Orr Ditch*, as in every comprehensive water adjudication, the requisite adversity was established inherently by the nature of the claims made, rather than by the identity of the claimants or their arrangement on the pleadings. Factual adversity *of claims* is inherently and sharply present, was present in *Orr Ditch*, and is sufficient (*Chicago, R.I.&P. Ry. Co. v. Schendel*, 270 U.S. 611, 46 S.Ct. 420 (1926)).

The strong federal policies of encouraging comprehensive water right adjudications (*Colorado River Water*

Conserv. Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976)), obtaining finality of judgments in property rights litigation (*United States v. Title Insurance and Trust Co.,* 265 U.S. 472, 44 S.Ct. 621 (1924)), and promoting judicial economy while protecting due process rights (*Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970 (1979)), will be severely undermined if the Ninth Circuit's decision is allowed to stand.

IV

THE NINTH CIRCUIT MISAPPLIES THIS COURT'S RULINGS IN HOLDING THAT THE SECRETARY OF THE INTERIOR WAS NOT AUTHORIZED TO NEGOTIATE AND EXECUTE AN OUT OF COURT SETTLEMENT OF DISPUTED INDIAN WATER RIGHTS

The *Orr Ditch* Final Decree, which TCID asserts as a preclusionary bar to the instant litigation, was a consent decree. It incorporated verbatim the provisions of the Truckee River Agreement settling the water rights of the various parties to the *Orr Ditch* litigation. (App. 102, 159-160, 231-233, 245.) The Truckee River Agreement was executed by the United States, TCID, and other major water users after extended negotiations during which TCID was independently represented. The Reclamation Service took no position, and the United States actively negotiated only on behalf of the Indians. In fact, the United States succeeded in obtaining agreement that the Pyramid Lake Reservation water right could be based on more reservation lands and a higher applied water duty than had been previously determined by the Special Master. (See Exhibits B-291, U-273, U-277, A-467, G-29, B-316, U-293, U-294, U-296, B-332, B-337, B-339, B-345, B-349.)

Because the Truckee River Agreement has vitality independent of the force of the *Orr Ditch* Final Decree, the

Ninth Circuit found it necessary to separately disable it. In footnote 10 of its decision, the Ninth Circuit states:

> 10. The district court did not rest its holding directly on 25 U.S.C. §§ 2 and 9. However, the defendants urge that two cases interpreting those sections, *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957) (*Ahtanum I*), and 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed.2d 683 (1965) (*Ahtanum II*), provide alternative authority for the Secretary to extinguish Indian waters.
>
> Even if we agreed that the *Ahtanum* cases could be extended by analogy to this case, those cases have been modified by *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), which was decided after *Ahtanum I* and before *Ahtanum II*. Under *Kake*, agreements between the government and non-Indians to alienate Indian property can only be valid if they are needed "to implement specific laws" other than 25 U.S.C. §§ 2 and 9. To be valid, then, the Secretary's conduct in *Orr Ditch* must find its basic authority elsewhere. (App., p. 29, n. 10)

In *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), the Ninth Circuit squarely held that the Secretary of the Interior had authority, under statutes empowering him to manage Indian affairs and all matters arising out of Indian relations (25 U.S.C. §§ 2, 9), to effect an out of court settlement of disputed Indian property rights. Ahtanum Creek bordered a treaty reservation and disputes arose between non-Indian settlers and the Indians as to the proper apportionment of the waters of the creek. In 1906, a non-Indian filed suit against a government agent concerning distribution of the creek's waters. As a result

of the litigation the Superintendent of Indian Affairs was "directed to see if an adjustment of the rights to use of the water could be made out of court" (236 F.2d at 329). In 1908, such an agreement was signed by the United States providing for twenty-five percent of the creek's flow to be allocated to the Indians and seventy-five percent to their non-Indian neighbors.

Thereafter the United States sued the non-Indian diverters of Ahtanum Creek for an adjudication of the Indians' water rights. The District Court dismissed the complaint, holding that the prior agreement barred the United States from claiming more than the twenty-five percent of the flow which had been guaranteed the Indians. The Ninth Circuit was faced squarely with the precise question it faces again in the instant litigation: Was the Secretary authorized to enter into such an out of court settlement? The Court held that he was, and found the agreement valid. It cited 25 U.S.C. § 2 and reasoned:

> It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other. The management of any parcel of land necessarily involves some degree of occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this. More specifically we have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers.

> The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians, but they were not nonexistent. . . . Where the waters of a stream are subject to use by different landowners, the very use itself involves some accommodation between the parties. It is common knowledge that, particularly in the early days, many streams in the West were used by appropriators or by riparian owners long before the stream rights had been adjudicated, and prior to the establishment of any machinery for the appointment of water masters. That sort of thing involves a measure of dealing between water users. Authority to manage property would normally comprehend dealings of this character.
>
> At the time the 1908 agreement was made, disputes had begun to appear as to the proper division and distribution of the waters of Ahtanum Creek. Of course it was then open to the United States, although not to the white landowners, to start court proceedings designed to adjudicate the rights of the litigants. It is the view of this court that it could not have been within the contemplation of Congress that the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream. (236 F.2d at 335, 336.)

Under the holding of *Ahtanum*, the Truckee River Agreement is clearly valid and binding on the United States, regardless of the effect of the *Orr Ditch* Final Decree. The Ninth Circuit now repudiates its *Ahtanum* holding, but does so by completely misinterpreting this Court's decision in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562 (1962). According to the Ninth

Circuit, *Kake* holds that Secretarial action is valid under 25 U.S.C. § 2 and § 9 only if necessary to implement other specific laws. Since no specific statute can be pointed to which expressly empowers the Secretary to compromise disputes involving Indian trust lands, the court reasons, the Secretary is not authorized to do so.

This interpretation of *Kake* is nothing short of amazing. *Kake* had nothing to do with management authority over trust property. It involved the interrelationship between State and federal *jurisdiction* over Indian activities.

In *Kake*, the issue was whether the Secretary had the authority to permit Indians to operate fish traps in navigable waters in contravention of State conservation laws. This Court held that Congress had neither granted the Indians immunity from State conservation laws while fishing on non-reservation lands, nor authorized the Secretary to do so.

In the discussion of this dispute over State jurisdiction, the Court referred to arguments made by the Secretary based on 25 U.S.C. §§ 2 and 9:

> In keeping with the policy of almost total tribal self-government prevailing when these statutes were passed, see 369 U.S., pp. 71-72, 82 S.Ct., p. 569, infra, the Interior Department itself is of the opinion that the sole authority conferred by the first of these [25 U.S.C. § 2] is that to implement specific laws, and by the second [25 U.S.C. § 9] that over relations between the United States and the Indians—not a general power to make rules governing Indian conduct. United States Department of the Interior, Federal Indian Law (1958), pp. 54-55; Cohen, Handbook of Federal Indian Law (1945), p. 102. We agree that they do not support the fish-trap regulations.
>
> (369 U.S. at 63, 82 S.Ct. at 564)

It is this language which the Ninth Circuit has transformed into a holding governing the management of Indian trust property. But such a far-reaching extension of *Kake* would strip the Secretary of authority to deal with and manage that property at all. Non-judicial dispute resolution is a necessary part of property management and of Indian relations. Adjustment of disputed rights is not the equivalent of "alienation" of Indian property, as the Ninth Circuit suggests. (App., p. 29, n. 10.) Where rights are uncertain and disputed, and mutual agreement can be reached, the adjustment may amount, as readily as not, to "acquisition" as to "alienation." Finally, where mutually acceptable arrangements can be made settling property disputes and providing a foundation for future neighborly relations between Indians and non-Indians, no reason appears why scarce judicial, financial, and human resources must be expended before the dispute can be effectively resolved.

The Ninth Circuit's opinion curtailing the scope of the Secretary's management powers unsettles, to an unknowable degree, established property interests which have been relied upon for generations. Because of this impact, and because it drastically limits the executive's management authority to deal with trust property in the future, this Court should accept this case to more fully describe the management authority vested in the Secretary of the Interior. Only with such clarification can the effectiveness of the Secretary's decisions be relied upon in future years and the validity of property interests founded upon his actions in past years be ascertained.

V

CONCLUSION

As shown by the foregoing discussion, the decision of the Ninth Circuit Court of Appeals in this case contradicts the principles of res judicata/collateral estoppel developed by this Court, directly conflicts with decisions of at least five other Circuit Courts of Appeals, and threatens the livelihood of thousands of reclamation project farmers and holders of other federally derived rights throughout the seventeen Western United States. The decision also misapplies a prior decision of this Court and so far extends it that it destroys the Secretary of the Interior's power to avoid unnecessary litigation through negotiated compromises of disputed rights in Indian trust property. As a result of the decision below, settled property interests throughout the West are needlessly exposed to disruption and challenge.

Because these reasons are special and important, petitioner respectfully requests that a writ of certiorari issue from this Court as prayed.

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Respectfully submitted,

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